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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 TERRY WEATHERS,

8 Petitioner,

9 v.

10 ISIDRO BACA, *et al.*,

11 Respondents.

Case No. 3:19-cv-00119-LRH-WGC

ORDER

12 This *pro se* habeas matter pursuant to 28 U.S.C. § 2254 comes before the Court following  
13 petitioner's response to the Court's order to show cause why the petition should be not dismissed  
14 as untimely. (ECF No. 3). Petitioner has responded. (ECF No. 4). For the reasons that follow, the  
15 petition will be dismissed as untimely, and this case will be closed.

16 Petitioner challenges his 1988 state court judgment of conviction for murder in the second  
17 degree with use of a deadly weapon. (ECF No. 1-1 at 2). Judgment of conviction was entered on  
18 February 22, 1988, and his direct appeal was decided on May 22, 1989. (*Id.* at 1.)

19 On July 3, 2017, petitioner filed a petition for writ of habeas corpus in state court. The  
20 petition was denied on January 25, 2019, as untimely and successive. *See*  
21 <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=51841> (last accessed Mar. 29,  
22 2019). Thereafter, petitioner filed his federal habeas petition on or about February 22, 2019. (ECF  
23 No. 1-1 at 13).

24 Under 28 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless otherwise  
25 tolled or subject to delayed accrual, generally begins running after "the date on which the judgment  
26 became final by the conclusion of direct review or the expiration of the time for seeking such direct  
27 review." However, for judgments that became final prior to the enactment of AEDPA, the statute  
28 of limitations expires one year from the date of AEDPA's enactment or on April 24, 1997, unless

1 otherwise tolled or subject to delayed accrual. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir.  
2 2001).

3 Petitioner's conviction became final before the enactment of AEDPA. Absent a basis for  
4 tolling or other delayed accrual, the time for filing a federal habeas petition expired on April 24,  
5 1997. The instant petition, filed nearly twenty-two years later, is therefore untimely on its face.

6 In his response, petitioner does not offer any argument on equitable tolling or actual  
7 innocence. Rather, he apparently asserts that his petition is timely pursuant to 28 U.S.C. §  
8 2244(d)(1)(C), which authorizes the filing of a claim within one year of "the date on which the  
9 constitutional right asserted was initially recognized by the Supreme Court, if the right has been  
10 newly recognized by the Supreme Court and made retroactively applicable to cases on collateral  
11 review." Petitioner argues that *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Welch v.*  
12 *United States*, 136 S. Ct. 1257 (2016), are new U.S. Supreme Court cases that require he be given  
13 the benefit of retroactive application of *Byford v. State*, 994 P.2d 700 (Nev. 2000). *Byford* held  
14 that Nevada law, embodied in what was known as the *Kazalyn* instruction, improperly blurred the  
15 line between deliberation and premeditation for purposes of first-degree murder, and held that  
16 going forward the courts must instruct separately as to those elements of the offense.

17 Petitioner's argument fails for two reasons. First, petitioner did not file his federal petition  
18 within one year of the U.S. Supreme Court cases on which he relies, which were both decided in  
19 2016. Importantly, the time during which his state habeas petition was pending did not statutorily  
20 toll the limitations period because that petition, dismissed as untimely, was not "properly filed."  
21 *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005). Second, petitioner was convicted of second-  
22 degree murder, so *Byford* therefore provides no relief in his case, even assuming his reliance on  
23 *Montgomery* and *Welch* were otherwise persuasive.

24 In short, petitioner has not established that his petition was timely filed. The petition must  
25 therefore be dismissed with prejudice as untimely.

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1 IT IS THEREFORE ORDERED that the petition in this action (ECF No. 1-1) is  
2 **DISMISSED WITH PREJUDICE.**

3 IT IS FURTHER ORDERED that petitioner is **DENIED** a certificate of appealability, as  
4 jurists of reason would not find the Court's dismissal of this action on procedural grounds to be  
5 debatable or wrong.

6 The Clerk of Court shall enter final judgment accordingly and **CLOSE** this case.

7 IT IS SO ORDERED.

8 DATED THIS 29th day of April 2019.

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11 LARRY R. HICKS  
12 UNITED STATES DISTRICT JUDGE  
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